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IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-626

MITSUI O.S.K. LINES, LTD., *Petitioner*

v.

STRACHAN SHIPPING COMPANY, *Respondent*

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT:	
Whether The Stevedore's Warranty Is Breached By The Longshoreman's Negligence Is No Longer A Viable Issue In This Case	5
Indemnity Was Denied Because Petitioner's Conduct Warranted Denial, Not Because Damages Recoverable From Petitioner Were Reduced By Plaintiff's Contributory Negligence	7
The Petition Does Not Present An Important Question Of Federal Law Or Issue Of Public Importance	10
CONCLUSION	12
CERTIFICATES OF SERVICE	12
APPENDIX A—ORDER OF DISMISSAL	13

AUTHORITIES

CASES

	Page
Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co., 406 U.S. 340, 32 L.Ed.2d 110, 92 S.Ct. 1550 (1972)	7
Garner v. Cities Service Tankers Corporation, 456 F.2d 476 (5th Cir. 1972)	8
Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 96 L.Ed. 318, 72 S.Ct. 277 (1952)	7
International Terminal Operating Co. v. N. V. Nederl. Amerik Stoomv. Moats., 393 U.S. 74, 21 L.Ed.2d 58, 89 S.Ct. 53 (1968)	5
Italia Societa, etc. v. Oregon Stevedoring Co., 376 U.S. 315, 324, 11 L.Ed.2d 732, 84 S.Ct. 748 (1964)	9
Lusich v. Bloomfield Steamship Co., 355 F.2d 770, 778 (5th Cir. 1966)	6, 7

CASES	Page
McAllister v. United States, 348 U.S. 19, 99 L.Ed. 20, 75 S.Ct. 6 (1954)	5, 8, 10
MONROSA, THE v. Carbon Black, Inc., 359 U.S. 180, 3 L.Ed.2d 723, 79 S.Ct. 710 (1959)	7
Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co., 350 U.S. 124, 100 L.Ed. 133, 76 S.Ct. 232 (1956)	5, 10, 11
Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 L.Ed. 1099, 66 S.Ct. 872 (1946)	10
Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 2 L.Ed.2d 491, 78 S.Ct. 438 (1958)	6, 7
STATUTES	
Longshoremen's and Harbor Workers' Compensation Act, §5 (b), Pub. L. 92-576, §18(a), 86 Stat. 1263 (33 U.S.C. §905(b))	2, 11
RULES	
Federal Rules of Civil Procedure, Rule 52(a)	8

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent here opposes the Petition for Writ of Certiori to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinions of the District Court (App. B of Petition) are unreported. The opinion of the Court of Appeals for the Fifth Circuit (App. A to Petition) is reported at 479 F.2d 432 (1973).

JURISDICTION

The jurisdictional prerequisites are adequately set forth in the Petition.

STATUTES INVOLVED

Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, as amended October 27, 1972, Pub. L. 92-576 § 18(a), 86 Stat. 1263 (33 U.S.C. § 905(b)), which provides as follows:

> "Exclusiveness of Remedy and Third-Party Liability
>
> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

QUESTIONS PRESENTED

The following questions presented for review are set forth in the Petition:

1. Does the contributory negligence of the plaintiff-longshoreman constitute, as a matter of law, a

breach by the stevedore-employer of its warranty of workmanlike performance to the ship?

2. Should the vessel be denied indemnity against the stevedore because the damages recoverable against the vessel have been reduced by a finding of contributory negligence?

Respondent respectfully suggests that the issue raised by the second question presented for review in the Petition is one of fact and that the question should be restated, as follows:

Whether the finding of the District Court that the action of the shipowner in furnishing a defectively designed and unseaworthy vessel constituted conduct sufficient to preclude indemnity, which was affirmed by the Court of Appeals, is clearly erroneous?

STATEMENT OF THE CASE

This longshoreman v. shipowner v. stevedore three-party suit was tried to the District Judge solely on the issues of liability, reserving damages for later determination.

The evidence showed and the Court found that on April 13, 1969, the now-forgotten plaintiff-longshoreman, Preston Julian, and other members of a gang of longshoremen employed by Respondent stevedore were ordered to load bales of cotton in the No. 5 hold of the M/V MEIJYUSAN MARU, which was owned and operated by Petitioner and moored upon the navigable waters of the United States at the Port of Galveston, Texas.

The only means of access to the No. 5 hold was by stepping from the main deck up and onto a winch deck located at the forward end of the hatch, and then descending a ladder affixed to the forward coaming. Conversely,

to leave the hold it was necessary to climb the ladder, step off on the winch deck, walk to its perimeter and step down to the main deck, over a lip or coaming on the edge of the winch deck 3½ inches in height, and then down to the main deck, a distance of 26½ inches. The plaintiff was injured when he fell while attempting to make the 26½ inch step down off the winch deck to go elsewhere on the ship. [Findings of Fact (1)-(5), inclusive, App. B of Petition].

The District Court held that Petitioner's vessel was defectively designed and unseaworthy because the only available route by which a longshoreman might proceed from the No. 5 hold to the main deck involved a 26½ inch drop for which no ladder or step had been provided [Conclusion of Law (3), App. B of Petition, p. 24]; that respondent stevedore did not breach its warranty of workmanlike performance [Conclusion of Law (4), App. B of Petition, p. 25]; that the plaintiff was contributorily negligent, thereby reducing his recovery by ninety-five percent [Conclusion of Law (5), App. B of Petition, p. 25]; and that by furnishing a defectively designed and unseaworthy ship the Petitioner hindered the stevedore's performance and was guilty of conduct sufficient to preclude indemnity [Conclusion of Law (8), App. B of Petition, p. 26].

Final Judgment was entered under Rule 54(b) of the Federal Rules of Civil Procedure dismissing the shipowner's third-party complaint, with prejudice, but retaining the plaintiff's action on the docket of the Court for a determination of his damages. The plaintiff's action was subsequently dismissed, without prejudice, on his own motion on September 18, 1973 [App. A hereto].

On the shipowner's appeal, the Court of Appeals for the Fifth Circuit reversed the District Court's finding of

no breach of the stevedore's warranty of workmanlike performance, but affirmed the finding that the shipowner's conduct in furnishing an unseaworthy vessel precluded indemnity under the circumstances of this case. Accordingly, the Court of Appeals affirmed the judgment of the District Court [App. A of Petition, p. 13].

ARGUMENT

Whether The Stevedore's Warranty Is Breached By The Longshoreman's Contributory Negligence Is No Longer A Viable Issue In This Case.

Petitioner contends that one of the questions for review is whether the contributory negligence of the longshoreman constitutes a breach of the stevedore's warranty as a matter of law, and that the refusal of the Court of Appeals to abandon its "factor" approach and so hold conflicts with decisions of the Courts of Appeal for the Second, Fourth and Ninth Circuits.

This Court has held that the issue of whether or not the stevedore has breached its warranty of workmanlike performance, first annunciated in *Ryan*,[1] is a question of fact which is not to be determined as a matter of law, *International Terminal Operating Co. v. N. V. Nederl. Amerik. Stoomv. Maats.*, 393 U.S. 74, 21 L.Ed.2d 58, 89 S.Ct. 53 (1968), and that the "clearly erroneous" doctrine of Rule 52(a) of the Federal Rules of Civil Procedure is applicable in reviewing a judgment of a trial court, sitting without a jury in admiralty. *McAllister v. United States*, 348 U.S. 19, 99 L.Ed. 20, 75 S.Ct. 6 (1954).

Although respondent would submit that the Court of Appeals erred in setting aside the trial judge's finding of

1. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.*, 350 U.S. 124, 100 L.Ed. 133, 76 S.Ct. 232 (1956).

no breach of warranty because Petitioner failed to demonstrate that finding to be clearly erroneous, *McAllister*, the point is academic because the Court of Appeals did not deny the claim for indemnity on the ground that the stevedore did not breach its warranty. In fact, the finding by the District Court of no breach of warranty was reversed, and the Court of Appeals specifically held that the longshoreman's negligence was, under the circumstances of this case, so substantial as to require the conclusion that the stevedore breached its warranty of workmanlike performance, even under that Court's "factor" approach. The real basis upon which the Court of Appeals affirmed the judgment of the trial court was that the action of the shipowner in furnishing a defectively designed, unseaworthy vessel constituted conduct on its part sufficient to preclude indemnity, under the rationale of *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 2 L.Ed.2d 491, 78 S.Ct. 438 (1958).

It is thus clear that the question as to whether or not the stevedore breached its warranty has already been decided favorably to Petitioner in the Court of Appeals.

The only complaint that Petitioner has is that the court below did not adopt Petitioner's view that *any negligence* of a longshoreman, however slight and in whatever form, automatically breaches the stevedore's warranty. Instead, using an approach under which the negligence of the longshoreman is simply a factor to be taken into consideration on the issue of breach of the contractor's warranty, the Court of Appeals found that, under the circumstances of this case, the longshoreman's negligence was so substantial as to require the conclusion that the warranty was breached (App. A of Petition, p. 16). *Lusich v. Bloomfield Steamship Company*, 355 F.2d 770, 778 (5th Cir.

1966). Since the decision below can be sustained on an independent ground, that is, that the Petitioner's conduct precluded indemnity, the fact that the *basis* for the holding that the stevedore breached its warranty may conflict with that recited by another Court of Appeals does not constitute an adequate reason for the grant of certiorari. *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 3 L.Ed.2d 723, 79 S.Ct. 710 (1959).

Indemnity Was Denied Because Petitioner's Conduct Warranted Denial, Not Because Damages Recoverable From Petitioner Were Reduced By Plaintiff's Contributory Negligence.

Although the Court of Appeals affirmed the holding of the District Court that the Petitioner was guilty of conduct sufficient to preclude indemnity in furnishing a defectively designed and unseaworthy ship, Petitioner seizes on language in the Court's opinion to the effect that damages were in fact pro-rated by the contributory negligence holding and the subsequent holding on indemnity. Building on this foundation, Petitioner asserts that such pro-rating violates the rule against contribution among joint tortfeasors in non-collision admiralty cases announced by this Court in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 96 L.Ed. 318, 72 S.Ct. 277 (1952) and reiterated in *Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co.*, 406 U.S. 340, 32 L.Ed.2d 110, 92 S.Ct. 1550 (1972).

The short answer to that contention is that the Petitioner's argument ignores completely the teachings of this Court in *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 567, 2 L.Ed. 491, 494, 78 S.Ct. 438, 441 (1958), in which Mr. Justice Clark, speaking for the Court, said:

> "* * * The evidence bearing on these issues—Petitioner's [shipowner's] action in making the shelter on its ship available to respondent's [stevedore's] employees in Boston although it apparently was unsafe, as well as respondent's continued use of the shelter for five days thereafter without inspection—was for jury consideration under appropriate instruction * * *. Since the liability of respondent depended upon different principles * * * all fact issues involved in the third-party action should have been submitted to the jury after the verdict in the main case. * * *."

Petitioner simply attempts to convert the District Court's purely factual finding of conduct sufficient to preclude indemnity, which was affirmed by the Court of Appeals, into an issue of law in an attempt to avoid the "clearly erroneous" rule of *McAllister v. United States*, 348 U.S. 19 (1954) and Rule 52(a) of the Federal Rules of Civil Procedure.

Respondent submits that a capsulation of the controlling principles of law applicable here are those set forth in *Garner v. Cities Service Tankers Corporation*, 456 F.2d 476, 481 (5th Cir. 1972), wherein the Court said:

> "The WWLP consists of the contractual obligation to perform duties under a contract with reasonable safety. Weyerhaeuser S.S. v. Nacirema Co., 355 U.S. 563, 567, 78 S.Ct. 438, 2 L.Ed.2d 491, 494 (1958). *The contracting parties are under reciprocal obligations: the stevedore (or shipyard) to perform its services with reasonable safety; the shipowner to provide a seaworthy vessel and to refrain from hindering performance by the stevedore.* Waterman Steamship Corp. v. David, 353 F.2d 660 (5th Cir. 1965), cert. den., 384 U.S. 972, 86 S.Ct. 1863, 16 L.Ed.2d 683 (1966). The determination of whether contractual indemnity should be allowed involves a

> weighing process evaluating the conduct of both parties to determine: (1) whether the warranty of workmanlike performance was breached; (2) whether that breach proximately caused the injury; and (3) whether the shipowner's conduct prevented the workmanlike performance. *David,* 353 F.2d 666; Southern Stevedoring & Contracting Co. v. Hellenic Lines, Ltd., 388 F.2d 267, 271-272 (5th Cir. 1968.)" (Emphasis supplied)

Petitioner would substitute for the "weighing process" in evaluating the conduct of both shipowner and stevedore, an arbitrary rule under which the stevedore would in effect be deprived of its right to a trial (by jury or judge) on the merits of the shipowner's action for indemnity as well as its defense of "conduct sufficient to preclude indemnity."

Here, following settled principles of law, the District Court weighed "the substantiality of the ship's fault against the stevedore's relative innocence" [Opinion of the District Court, Petition, p. 28] and determined that indemnity should be precluded because the 26½ inch drop from the winch deck to the main deck—the unseaworthy condition which proximately caused the injury—was a physical characteristic of the ship. As between the ship and the stevedore, the Court found that the former was clearly the party best situated to adopt preventative measures and thereby reduce the likelihood of injury, citing *Italia Societa, etc. v. Oregon Stevedoring Co.,* 376 U.S. 315, 324, 11 L.E.2d 732, 84 S.Ct. 748 (1964).

Petitioner's contention that it should not be denied indemnity "simply because there is a finding of unseaworthiness or primary negligence" (Petition, p. 11), would give a shipowner license to sail its vessels from port to port with absolutely no incentive to correct an unsea-

worthy condition. So long as there is a possibility of imposing even an infinitestimal percentage of contributory negligence upon the unfortunate longshoreman injured by such a condition, any recovery by the longshoreman, as well as the costs of defending his action, would automatically be passed to the stevedore.

Respondent respectfully submits that the District Court followed settled decisional law of this Court in denying the shipowner's claim for indemnity under the circumstances of this case.

The finding by the District Court of conduct sufficient to preclude indemnity is fully supported by the evidence. Petitioner has failed to demonstrate that such finding is clearly erroneous and thus has failed to carry its burden under Rule 52(a) of the Federal Rules of Civil Procedure and *McAllister v. United States*, 348 U.S. 19, 99 L.Ed. 20, 75 S.Ct. 6 (1954). Respondent respectfully submits, therefore, that the Petition should be in all things denied.

The Petition Does Not Present An Important Question Of Federal Law Or Issue Of Public Importance.

Far from presenting for review questions which deal with tremendously important principles, the resolution of which will have immediate importance beyond the particular facts and parties involved, the questions here presented have been, in effect, determined adversely to Petitioner by a recent Congressional enactment. The 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act eliminate the unseaworthiness remedy given longshoremen in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 L.Ed. 1099, 66 S.Ct. 872 (1946), and the *Ryan* Doctrine [*Ryan Stevedoring Co. v. Pan Atlantic S.S.*

Corp., 350 U.S. 124, 100 L.Ed. 133, 76 S.Ct. 232 (1956)], under which the stevedore became obligated to indemnify the shipowner for a breach of its implied warranty of workmanlike performance in the absence of conduct on the part of the shipowner to preclude indemnity. Those changes are contained in Section 5 (b) of the Act (33 U.S.C. §905(b)), which also provides that the plaintiff-longshoreman retains his cause of action for negligence against the vessel, and that the employer shall not be liable to the vessel for damages recovered by the longshoreman, directly or indirectly, and that any agreements or warranties to the contrary shall be void.

Congress left no doubt that it intended that any warranties, express or implied, as well as hold-harmless agreements, running from the stevedore to the shipowner (at least in the context of the new Act) would be against public policy. House Report No. 92-1441, 92d Congress, 2d Session, contains the following language:

> "Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injury.
>
> Accordingly, the Bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.
>
> Under the proposed amendments the vessel may not by contractual agreement or otherwise require the employer to indemnify it, in whole or in part, for such damages." 1972 U.S. Code, Cong. & Adm. News 4704-4705.

It is thus patently clear from the legislative history of the Act that current public policy of the United States, as set forth in such Act, would require denial of Petitioner's claim for indemnity.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Petition for a Writ of Certiorari should be in all things denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief in Opposition to the Petition for Writ of Certiorari was served upon Messrs. B. D. McKinney and Joseph D. Cheavens, 3000 One Shell Plaza, Houston, Texas 77002, attorneys for Petitioner, by mailing copies of same to them by certified mail, return receipt requested, this _____ day of October, 1973.

Theodore Goller

APPENDIX A

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

PRESTON JULIAN

v.

MITSUI O.S.K. LINE, LTD., ET AL

v.

STRACHAN SHIPPING CO.

Civil Action No. 69-G-168

On this the 18th day of September, 1973, came on to be heard plaintiff's Motion and it is hereby ORDERED, ADJUDGED and DECREED by this Court that the said cause of action be dismissed without prejudice and costs assessed against the plaintiff herein.

JAMES NOEL
United States District Judge

9/18/73

True Copy I Certify Attest:

V. Bailey Thomas, Clerk
A. H. Battles, Jr.

Deputy Clerk